

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

March 21, 2006

No. 259067

Wayne Circuit Court

LC No. 04-006744-01

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions for second-degree murder, MCL 750.317, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The court sentenced defendant to 40 to 75 years for the murder conviction, one to five years for the felon in possession of a firearm conviction, and two years for the felony-firearm conviction. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

This case arose out of the shooting death of Kevin Ross (Ross) on June 7, 2000. Defendant was seen arriving at the home of Lucille Coles, the aunt of Kienda Lewis. Lewis, who was inside the home, heard shots, looked outside and saw Ross's car spinning in a field. Another witness heard the shots and saw defendant with something in his hand, and then saw defendant flee hastily in a car.

Defendant argues he is entitled to a new trial because the prosecutor made comments in closing arguments that amount to misconduct and thus, denied him a fair trial. We disagree. Generally, defense counsel must object to an allegedly improper line of questioning or argument. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). Because defendant did not object below, except to the admission of some of his aliases, this issue is not preserved for appeal, and this Court reviews those claims for plain error affecting substantial rights. *Id.*, p 448. "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). Also, the rule regarding unpreserved objections to alleged prosecutorial misconduct is that appellate review is precluded "unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Claims of prosecutorial misconduct are reviewed case by case, and a reviewing court evaluates the comments at issue in context. *People v Shutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). “Generally, prosecutors are accorded great latitude regarding their arguments and conduct.” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal quotations and citation omitted). “Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as it relates to their theory of the case.” *Schutte*, *supra*, p 721.

Moreover, were we to find that the prosecutor has made improper remarks, reversal is not necessarily warranted; “[o]therwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel.” *Id.* “No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *Id.*

The prosecutor’s challenged remarks do not constitute prosecutorial misconduct. Much of the challenged comments are a fair summary of the evidence. For example, evidence indicates that after defendant arrived at Coles’ home, an argument occurred between defendant and Ross, shots were fired, defendant was seen with something in his hand, and then was seen hastily fleeing the scene. It was a fair inference from the evidence that defendant was the shooter and, thus, the “killer.” Regarding the statement that defendant fled justice, this statement is unimpeached by defendant, and flight evidences consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

The prosecutor’s remarks about Lewis’ and Coles’ fear, and other remarks about the threats to Lewis, were not prosecutorial misconduct because the prosecutor was relying on the evidence. Also, the affidavit Lewis submitted to obtain a PPO against defendant after the shooting supported other challenged remarks of the prosecutor.

The prosecutor’s comments about Stultz’s 911 call were reasonable inferences from the evidence. Also, there is evidence that defendant had sundry aliases in Michigan and Minnesota. Evidence suggested that at least some of defendant’s aliases were used to facilitate flight. Finally, the trial court instructed the jury that the arguments of the attorneys are not evidence, and that the jury should base its decision on the evidence and not sympathy. Moreover, the evidence does not suggest that any prosecutorial misconduct was outcome-determinative.

Because there was no outcome-determinative prosecutorial misconduct, defendant’s argument that he was denied his right to the effective assistance of counsel, by reason of his attorney’s failure to object to the prosecutor’s closing argument, lacks merit. An attorney is not required to make futile objections. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Affirmed.

/s/ Janet T. Neff  
/s/ Henry William Saad  
/s/ Richard A. Bandstra